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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR J. GERBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICI CURIAE* IN SUPPORT OF THE PETITION OF ARTHUR J. GERBER

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Listing of the Amici Curiae

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AMERICAN SOCIETY FOR AMATEUR ARCHAEOLOGY
ANTIQUE TRIBAL ARTS DEALER ASSOCIATION, INC.
ARCHAEOLOGICAL SOCIETY OF OHIO, INC.
ARKANSAS TREASURE SEEKERS
BLACK THUNDER MARKETING
CENTRAL STATES ARCHAEOLOGICAL SOCIETIES, INC.
CIVIL WAR NEWS
COIN WORLD
CONCH COALITION, INC.
DOUBLE EAGLE PUBLISHING
FEDERATION OF METAL DETECTING AND
ARCHAEOLOGICAL CLUBS, INC.
FISHER RESEARCH LAB., INC.
GARRETT ELECTRONICS, INC.
GOLD PROSPECTORS ASSOCIATION OF AMERICA, INC.
HORIZON DISTRIBUTING CORPORATION
INDIAN-ARTIFACT MAGAZINE, INC.
KRAUSE PUBLICATIONS
LOST TREASURE, INC.
MID-JERSEY RESEARCH & RECOVERY CLUB
MINELAB ELECTRONICS, PTY. LTD.
MODERN GOLD MINER'S ASSOCIATION, INC.
MOTHER LODE RESEARCH CENTER
NATIONAL SOCIETY OF METAL DETECTORISTS, INC.
NORTH COAST RECOVERY ASSOCIATION OF OHIO
PEOPLE'S PUBLISHING CO., INC.
PUBLISHER'S PRESS, INC.
ROADRUNNER PROSPECTORS CLUB, INC.
SMITH COUNTY METAL DETECTING ASSOCIATION
SOCIETY FOR DOCUMENTATION OF PREHISTORIC AMERICA
SOUTH MOUNTAIN RELIC AND COIN CLUB
TESORO ELECTRONICS, INC.
TEXAS COUNCIL OF TREASURE CLUBS
TREASURE COAST COALITION, INC.
TREASURE QUEST MAGAZINE, INC.
TYNDALL ELECTRONICS, INC.
WHITE'S ELECTRONICS, INC.

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BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION OF ARTHUR J. GERBER

With written consent of the Petitioner and the Respondent, filed concurrently herewith, amici curiae ("amici") submit this brief as amici curiae in support of the Petition of Arthur. J. Gerber for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

INTEREST OF AMICI CURIAE

Amici consist of the following organizations: The American Numismatic Association (ANA) (a non-profit educational corporation chartered by the United States Congress with

over 29,000 members, devoted to the science and hobby of collecting coins, medals, tokens, and paper money); American Society for Amateur Archaeology (an organization of several hundred amateur scientists and archaeologists, located in Buffalo, New York); Antique Tribal Arts Dealer Association, Inc. (ATADA) (an organization consisting of 166 members committed to full and fair disclosure in its dealers' trade practices and in ensuring that its dealers' business practices respect those cultures which it affects); Archaeological Society of Ohio, Inc. (an association of 2,758 collectors, interested citizens, and avocational and professional archaeologists, located in Plain City, Ohio, devoted to locating, reporting, and preserving archaeological sites and material, and serving as a bond between professional and non-professional archaeologists to disseminate information); Arkansas Treasure Seekers (an association of metal detectorists located in Hot Springs, Arkansas); Black Thunder Marketing (an advertising and marketing division of Rock Bridge Enterprises, Inc., which targets collectors of Civil War items, located in Berryville, Virginia); *Civil War News* (a magazine owned by Cutter and Lock, Inc., devoted to the Civil War, with 8,000 subscribers); Central States Archaeological Societies, Inc. (an amateur archaeological association located in Saint Louis, Missouri, with over 4,000 members residing in Illinois, Missouri, Indiana, Arkansas, Kentucky, Tennessee, Iowa, Wisconsin, Georgia, Alabama, Michigan, North Carolina, and South Carolina); *Coin World* (a news weekly, owned by Amos Press, Inc., with 62,400 subscribers published for collectors of coins, medals, and tokens); Conch Coalition, Inc. (a 2,000-member organization of amateur and professional divers, located in Marathon, Florida, who pursue historical research and artifact recovery); Double Eagle Publishing (a publisher located in Yucaipa, California, which publishes three magazines with a combined readership of over 100,000,

with a focus on metal detecting and historical research); Federation of Metal Detecting and Archaeological Clubs, Inc. (FMDAC) (a federation of clubs, with several thousand members nationwide, devoted to metal detecting and amateur archaeology); Fisher Research Lab., Inc. (a manufacturer of metal detectors located in Los Banos, California); Garrett Electronics, Inc. (a manufacturer of metal detectors and security devices located in Garland, Texas); Gold Prospectors Association of America, Inc. (GPAA) (an association of gold prospectors and treasure hunters with over 125,000 members and over 250,000 subscribers to its magazine, located in Bonsall, California); Horizon Distributing Corporation (a distributor of metal detectors located in Painesville, Ohio); Indian-Artifact Magazine, Inc. (publisher of *Indian-Artifact Magazine*, a magazine devoted to Native American artifacts, published in Turbotville, Pennsylvania, with over 4,000 subscribers); Krause Publications (publisher of over twenty titles, serving a wide variety of collecting audiences, with 610,000 subscribers and companion newsstand distribution of 1,200,000, located in Iola, Wisconsin); Lost Treasure, Inc. (the publisher of *Lost Treasures* magazine, with articles on metal detecting and treasure hunting, and readership in excess of 150,000); Mid-Jersey Research & Recovery Club (a 2,000-member association of metal detectorists from the mid-Atlantic coast, located in New Egypt, New Jersey); Minelab Electronics, Pty. Ltd. (an Australian manufacturer of metal detectors); Modern Gold Miner's Association, Inc. (a 3,000-member organization devoted to gold mining and recreational treasure hunting located in Happy Camp, California, and publisher of *Gold and Treasure Hunter* magazine); Mother Lode Research Center (a think tank for land reform, located in Auburn, California); National Society of Metal Detectorists, Inc. (a non-profit organization of metal detectorists with nationwide membership); North Coast

Recovery Association of Ohio (a club with fifty members devoted to metal detecting, located in Painesville, Ohio); People's Publishing Co., Inc. (a publisher of metal detecting magazines, with monthly readership in excess of 100,000, located in Arcata, California); Publisher's Press, Inc. (publishers and sponsors of *North South Trader's Civil War* collector's magazine with over 20,000 readers, North South Trader's Civil War collectors's price guide, and North South Trader's National Civil War Show, located in Orange, Virginia); Roadrunner Prospectors Club, Inc. (a group of prospectors and treasure hunters, located in Phoenix, Arizona); Smith County Metal Detecting Association (a metal detecting club located in Flint, Texas); Society for Documentation of Prehistoric America (a 900-member organization located in Rochester, Indiana, devoted to collecting and studying Native American antiquities); South Mountain Relic and Coin Club (a club whose members have interests in Civil War relics, coins, medals, and tokens, located in Hagerstown, Maryland); Tesoro Electronics, Inc. (a manufacturer of metal detectors, located in Prescott, Arizona); Texas Council of Treasure Clubs (an organization of metal detectorists located in Gilmer, Texas, with 2,000 members); Treasure Coast Coalition, Inc. (a diverse group committed to opposing excess government control, located in Sebastian, Florida); Treasure Quest Magazine, Inc. (publisher of *Treasure Quest* magazine, a magazine focusing on archaeology, paleontology, and Native American artifacts, located in McLeam, Virginia); Tyndall Electronics, Inc. (a manufacturer of metal detectors designed specifically for locating Civil War relics, located in Coats, North Carolina); and White's Electronics, Inc. (a manufacturer of metal detectors, located in Sweet Home, Oregon).

As the above list indicates, amici are a diverse group both geographically and in terms of their interests and pursuits. Amici primarily engage in activities from one or more of the following broad categories: amateur archaeology, treasure hunting, metal detecting, or marine salving; collecting, buying, and selling antiquities, Civil War relics, Native American artifacts, bottles, coins, tokens, medals, and the like; and participation in industries related to these hobbies, such as publishing magazines and trade journals, and manufacturing and distributing metal detectors and related items.

Amici believe that review of the decision below is imperative both because the court of appeals misapplied the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm ("ARPA"), and because the precedent set by the court of appeals' confusing and erroneous decision may unnecessarily inhibit a vast number of individuals and businesses from pursuing a wide range of activities pertaining to "archaeological resources" that are not and should not be violative of ARPA.

The court of appeals held that ARPA applied to archaeological resources removed from private lands. *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993). Amici have a strong interest in that holding because virtually all of amici's activities involve private land or items removed from private land. Significantly, the court of appeals' holding marked the first time that ARPA has been extended to private lands. *Id.* at 1113. Since ARPA's inception, amici believed that ARPA does not extend to private lands based on the scholarly commentaries, the government's written interpretation, and Congress' intent in enacting ARPA (as stated in the act and its legislative history). Although the court of appeals' decision involved

removing artifacts from private property without the owner's express consent, many hobbyists seek "archaeological resources" on their own land or on private land with the owner's consent. Of particular concern to amici is the distinct possibility that individuals will now be subject to ARPA's criminal provisions for removing archaeological objects from their own land or from private land, even though they had obtained the owner's consent. In addition, collectors and dealers, who previously thought they were immune from ARPA when they purchased artifacts excavated from private property, no longer have that security. Therefore, amici have a compelling interest in seeing that the court of appeals' holding on the private land issue is scrutinized by this Court.

The court of appeals also held that the violation of a state or local law, regulation, ordinance, or permit that triggers Section 470ee(c) of ARPA need only be "related" to protecting archaeological sites and objects, and that the underlying violation need not involve a cultural resources protection law of the type that all fifty states have enacted. *Id.* at 1116. Amici oppose this aspect of the court of appeals' decision. The court of appeals' newly-formed standard is altogether unclear, and, as a result, amici (and their members, readers, dealers, and customers) will be left to guess whether inadvertent or purely technical violations of a wide variety of state civil laws and municipal ordinances will subject them to ARPA's forfeiture and criminal provisions. It is feared that the lack of clarity in the court of appeals' relatedness standard will have a chilling effect on amateur archaeologists, treasure hunters, metal detectorists, artifact collectors, and antiquities collectors, as these citizens choose not to pursue their lawful hobbies rather than face the risk that they may be found to have

unwittingly violated ARPA's criminal provisions.[1] Amici thus have a strong interest in seeking clarification of the court of appeals' holding concerning the requisite state or local law violation referred to in Section 470ee(c) of ARPA.

The combined effect of the court of appeals' decision casts a cloud over the hobbies, activities, and businesses engaged in by amici. That decision threatens the vitality of collectors and dealers of a wide variety of objects of archaeological significance that are older than 100 years old, such as Civil War relics, Native American artifacts, antiquities, bottles, coins, tokens, medals, and the like. The court of appeals' decision also threatens to curtail vastly the industries that are supported by collectors, dealers, archaeologists, marine salvors, and metal detectorists. That is unfortunate because the court of appeals' decision on these important issues appears to be fundamentally flawed. Therefore, absent clarification by this Court over the scope and meaning of Section 470ee(c) of ARPA, amici may wrongly be subjected to ARPA's provisions.

Amici wish to emphasize that they do not support the illegal digging of archaeological objects and sites located on federal and Indian lands or the unlawful digging of burial sites. In that regard, amici strongly support the federal government's use of ARPA and other laws to pre-

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[1] Amici realize that under Section 470ee(c) and the court of appeals' ruling, some law must be violated in order to trigger Section 470ee(c). However, amici believe that violating a civil ordinance or statute that is deemed by a court as "related" to protecting archaeological resources under some as of yet undefined standard should not trigger ARPA's criminal and forfeiture provisions, and that the court of appeals should have required the violation of a cultural resources protection law.

vent and punish looting of cultural items located on federal and Indian lands. Unfortunately, ARPA and other existing laws that were enacted for protecting archaeological sites and objects contain loopholes and have been very difficult to enforce.[2] Amici's concern is that in an attempt to close these loopholes, prosecutors and the courts have and will improperly reinterpret existing laws in a way that is fundamentally at odds with Congress' original intent in enacting such legislation. The court of appeals' unprecedented, expansive reading of ARPA appears to be a product of this type of overzealous application of a statute in a manner wholly unintended by Congress. For these reasons, amici have an interest in this case and support the petition of Arthur J. Gerber.

SUMMARY OF ARGUMENT

As amici's interest in this case demonstrates, the writ should be issued because the issues of first impression decided by the court of appeals potentially have a far-reaching effect on amici, as well as archaeologists, metal detectorists, marine salvors, and anyone who collects, excavates, buys, or sells objects older than one-hundred years old that are of archaeological significance, such as Native American artifacts, Civil War relics, antiquities,

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[2] *See, e.g.*, Robert K. Landers, *Is America Allowing its Past to be Stolen?*, Cong. Q.'s Editorial Research Rep. 34, 40 (Jan. 18, 1991) ("Enforcement of ARPA not only frequently failed to result in felony convictions, but sometimes backfired completely"); Linda M. Jones, *Preserving Utah's Cultural Resources: A Proposal for New Legislation*, 10 J. Energy L. & Pol'y 93, 1117 (1989) ("Utah and federal legislation contain numerous loopholes"); Lorrie D. Northey, *The Archaeological Resources Protection Act of 1979: Protecting Prehistory for the Future*, 6 Harv. Envtl. L. Rev. 61, 114 (1982) ("Congress should amend [ARPA] to eliminate unnecessary loopholes").

bottles, medals, tokens, and similar items. The writ should also be granted because the court of appeals erred in applying ARPA to archaeological resources removed from private lands. That holding renders ARPA internally inconsistent, is at odds with Congress' stated intent, and is also at odds with the analysis of scholarly commentators and the Federal government. Finally, the writ should be granted because the court of appeals erred in determining what types of laws trigger Section 470ee(c). The uncertainty and unworkability of that test will create undue confusion both to future courts and to people trying to determine whether they are complying with ARPA.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN APPLYING SECTION 470EE(C) TO ARCHAEOLOGICAL OBJECTS REMOVED FROM PRIVATE LANDS

There are a number of indications that the court of appeals' holding that ARPA applies to private lands is suspect: the language of ARPA, its legislative history, and the conclusions of scholarly commentators and the Federal government. The court of appeals' apparent error here is of particular concern to amici since their activities are almost entirely focussed on private lands and items removed from private lands. If the court of appeals was incorrect in its holding on this issue, then amici will be needlessly subjected to ARPA's provisions.

First, the language of ARPA itself argues against the court of appeals' holding. ARPA's stated purpose is "the protection of archaeological resources which are on public and Indian lands . . . ." 16 U.S.C. § 470aa(b). In addition there is no mention of private lands or of any

lands other than "public and Indian lands" anywhere in ARPA. Had Congress intended for ARPA to apply to private lands, amici believe that ARPA would clearly state as much, particularly in light of the ramifications of including private land within ARPA's coverage. Also, even the court of appeals took note of the fact that if ARPA applies to private lands its provisions do not "jibe perfectly with the surrounding provisions," and that such an application would render ARPA both overinclusive and underinclusive. *Gerber*, 999 F.2d at 1115.

Second, the legislative history of ARPA refers repeatedly to public and Indian lands and makes no references whatsoever to private lands. *See, e.g.*, H.R. Rep. No. 96-311, 96th Cong., 1st Sess. 7 (1979) (purpose is "protection for archaeological resources on public lands and Indian lands); S. Rep. No. 96-179, 96th Cong., 1st Sess. 6 (1979) (purpose is to "provide greater protection . . . for archaeological resources on public lands and Indian lands"); 125 Cong. Rec. S10,832 (1979) (statement of Sen. Bumper) ("The purpose . . . is to provide greater protection . . . for archaeological resources located on public and Indian lands"); 125 Cong. Rec. S14,721 (1979) (statement of Sen. Bumper) ("this measure will protect archaeological resources located on public and Indian lands"). Congressman Udall, a chief sponsor of ARPA, stated that ARPA "prohibits the wanton destruction of archaeological sites and resources located on the *public domain or Indian lands*," and that ARPA "provides that recovered archaeological resources will remain the property of the United States." 125 Cong. Rec. 17,393-94 (1979) (emphasis added). Significantly, Congressman Udall added the following remarks: I want to emphasize in the boldest terms what the bill does not do: . . . It does not affect any lands other than the public lands of the United States and lands held

in trust by the United States for Indian tribes or individual Indian allottees." *Id.* These unambiguous expressions of Congressional intent provide compelling evidence that Congress had no intention of extending ARPA beyond public and Indian lands.

Finally, "[m]ost of the scholarly commentators on the Act assume that it is limited to federal and Indian lands." *Gerber*, 999 F.2d at 1115. Also, the Government had for some time—at least up until the commencement of this case—taken the view that ARPA did not apply to private lands. For example, the Department of Justice's sourcebook for prosecutions of ARPA cases states that ARPA violations require "that said resource was located on public and Indian lands. . . ." 2 *Archaeological Resources Protection: Federal Prosecution Sourcebook* at 1066 (Office of Professional Development and Training, Criminal Division, Department of Justice ed., 1992) (quoting Carol Carnett, United States Dep't of Interior, *Legal Background of Archaeological Resources Protection* 10 (United States Dep't of Interior Technical Brief No. 11) (1991)). In addition, the USDA Forest Service's only statement on the issue is that "[a] conviction under [ARPA] requires proof . . . [t]hat said resource was located on public lands. . . ." Southwestern Region, USDA Forest Service, *Cultural Resources Law Enforcement An Emerging Science* 101 (1980). Finally, the Department of the Interior's 1989 report to the Senate Committee on Energy and Natural Resources, in discussing the growing problem of archaeological looting, notes that "[s]ome of this destruction occurs on sites on private land and is not under the jurisdiction of the Federal government." U.S. Dept. of Interior, *Federal Archaeology: The Current Program* 31 (1989).

Therefore, there are strong indications that the court of appeals erred in its holding. The significance of that

holding on amici and their counterparts is plain and unmistakable: an erroneous decision unnecessarily subjects amici and their counterparts to ARPA. Amici therefore request that this Court grant certiorari so that court of appeals' important holding on this important, far-reaching issue of first impression can be reviewed expeditiously.

II. THE COURT OF APPEALS' HOLDING AS TO THE NECESSARY STATE LAW VIOLATION IS INCORRECT AND CONFUSING

The court of appeals' holding as to the type of law that triggers Section 470ee(c) is also incorrect and will lead to confusion as courts and amici try to interpret its meaning. Although Section 470ee(c) refers to the violation of "any" state or local law, ordinance, or permit, the court of appeals correctly determined that a literal application of "any" was improper and it placed a limiting construction on "any." *Gerber*, 999 F.2d at 1116. Under that limiting construction, the state or local law has to be "*related* to the protection of archaeological sites and objects." *Id.* (emphasis added). A more appropriate limiting construction, suggested by ARPA's legislative history, a USDA publication, and the design and object of ARPA is that the law must be a cultural resources protection law. For example, the USDA Forest Service states that "[s]ubsection (c) enlists Federal assistance in enforcing state and local antiquities laws. . . ." Robert B. Collins, *The Meaning Behind ARPA: How the Act is Meant to Work, in Cultural Resources Report No. 32* (Southwestern Region, USDA Forest Service ed., 1980) (emphasis added). Also, the only legislative history on subsection (c) is the statement of Senator Domenici, the Senate Sponsor of ARPA, that ARPA "would dovetail with existing state laws, such as New Mexico's, so that offenders could not

skip to another state to avoid prosecution." 125 Cong. Rec. S10,834 (1970). Senator Domenici clearly had state cultural resources protection laws in mind since New Mexico had recently enacted such a law at the time of his comments. N.M. Stat. Ann. §§ 18-6-3 to 18-6-22 (1993).

Amici's concern with the court of appeals' newly-formulated relatedness test is that it is really no test at all. The court of appeals offered no guidelines or standards for the application of the relatedness test. Courts will be confused in its application, and amici and their counterparts will be confused as to the ramifications of their actions. This is a particular concern because under Section 470ee(c) even civil laws and local ordinances can trigger ARPA's criminal and forfeiture provisions. 16 U.S.C. § 470ee(c). Consequently, a relatively minor transgression of civil law can snowball into a federal criminal offense and forfeiture of property. Although the court of appeals rejected a literal application "any" because it would have "carried the Act far beyond the objectives of its framers and created pitfalls for the unwary," amici believe that the court of appeals' limiting construction fails to overcome that concern. *Gerber*, 999 F.2d at 1116. Therefore, this Court should issue the writ so that the error and confusion stemming from the court of appeals' relatedness test can be promptly resolved.

CONCLUSION

The court of appeal's decision on these issues of first impression will have an far-reaching impact on amici, yet it is confusing and appears to be flawed. In order to correct those flaws and provide definitive guidance to the

federal courts and amici in future matters, amici respectfully urge this Court to issue the writ.

Respectfully submitted,

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